UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ACE MASONRY, INC., d/b/a ACE UNLIMITED and
BELLA MASONRY, LLC, alter egos and
BELLA FURNITURE SOLUTIONS, INC. and
HENRY BELLAVIGNA, LISA BELLAVIGNA,
ROBERT P. BELLAVIGNA and
DOMENICK BELLAVIGNA, Individuals

and **Cases 03-CA-073540**
03-CA-074523

INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS, LOCAL NO. 3

and **03-CA-073549**
03-CA-074531

LABORERS INTERNATIONAL UNION, LOCAL NO. 785

and **03-CA-079606**

NORTHEAST REGIONAL COUNCIL OF CARPENTERS

Greg Lehmann, Esq., Counsel for the
General Counsel
Robert L. Boreanaz, Esq., Counsel for the
Charging Parties
Jason B. Bailey, Esq., Counsel for the
Respondents

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Syracuse, New York on various days in May, July and August, 2014.

This is a case arising out of a Backpay Specification that was issued on July 10, 2013. The underlying case was decided by an ALJ on December 12, 2012 and was upheld by the Board. The Board's Decision and Order was then enforced by the United States Court of Appeals for the Second Circuit on March 26, 2013. [1]

[1] The first charge was filed on February 1, 2012. Thereafter, charges were filed on February 15, April 26, April 27 and April 30, 2014. A Compliant was issued on April 31, 2012 and an amended Consolidated

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

In the original case it was held that a company called Bella Masonry, LLC was the alter ego of Ace Masonry Inc., d/b/a Ace Unlimited and that both violated Section 8(a)(5) and (1) of the Act when they refused to abide by three collective agreements with the unions named above. These Respondents were ordered to make the employees covered by the respective labor contracts whole for any differences in their pay resulting from the failure of the Respondents to apply the terms of the respective contracts to them. Also, the Respondents were ordered to make whole certain of the unions' benefit funds where the Respondents had defaulted on their contractual obligations.

The Specification, as amended at the hearing, alleged that for the period from September 21, 2011 until the cessation of business by Bella, (Ace having ceased doing business on or about December 31, 2011). There is no dispute regarding the amounts of money owed as the parties entered into a stipulation at the hearing. Thus, the amount owed to the Carpenters' Funds, exclusive of interest and liquidated damages, is $48,553.16. The amount owed to the Bricklayers' Local 3 Funds, exclusive of interest and liquidated damages, is $60,026.26. The amount owed to the Bricklayers' International Funds, exclusive of interest and liquidated damages, is $11,949.79. The amount owed to the Laborers' International Funds, exclusive of interest and liquidated damages, is $8,242.84. Finally, the amount due individual employees is $11,309.11.

It is alleged and conceded that the Respondents Ace Masonry and Bella Masonry did not comply with the Board's requirement that the Notice be mailed to employees. It further was alleged and conceded that the Respondents failed to provide certain information to the Bricklayers and the Laborer's Unions; such information being ordered to be produced by the Board's enforced Order.

Therefore, the only issue remaining in this case is whether certain individuals connected to these corporate entities should be held to be derivatively and personally liable for the amounts set forth above. It is alleged that Henry Bellavigna, Lisa Bellavigna and Robert P. Bellavigna should be individually liable because, among other things, they commingled their own personal assets with the respective corporate entities and transferred funds to and from these corporations to either themselves or to their family members in order to evade liability. It also is alleged that another family member, Domenic Bellavigna, is liable for an amount of money that he received for services that he rendered to Bella Masonry at a rate greatly in excess of market value. In this respect, the General Counsel contends that this was just another way of transferring corporate funds to a family member in order to evade Respondents' legal responsibilities to make contractually owed payments owed to employees via union benefit funds. As to Domenic Bellavigna, the General Counsel is contending that any liability incurred

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Complaint was issued on June 27, 2012. The cases were heard by Judge Carter from July 30 to September 13, 2012 and he issued his decision on December 12, 2012. The Board issued its Order on January 23, 2013 and the United States Court of Appeals for the Second Circuit issued a judgment enforcing the Board's Order on March 26 2013.

by him should be capped at the value of certain parcels of land transferred to him by Henry Bellavigna plus the amount of money that he received for the services he purportedly provided for Bella Masonry.

In the underlying unfair labor practice case, the following facts were established and are not subject to relitigation.

Lisa Bellavigna was the founder and owner of Ace Masonry, Inc. The name of that company was changed in 2006 to Ace Masonry, Inc., d/b/a Ace Unlimited. [2] Robert Bellavigna is her husband and was employed by Ace as its project coordinator and field supervisor. Henry Bellavigna is Lisa's father-in-law, who in 2004, was hired by Ace to be its chief estimator and senior project manager.

On September 21, 2011, Henry Bellavigna, while still employed by Ace Masonry, established his own company called Bella Masonry.

In October 2011, about six to eight employees of Ace Masonry were invited by Henry and Robert Bellavigna to join Bella Masonry as employees. When Bella Masonry became operational, Henry Bellavigna was the owner and Robert Bellavigna became the field supervisor. As in the case of Ace, Robert Bellavigna, had no ownership interest in Bella Masonry.

At the end of December 2011, all of the employees left Ace Masonry and certain equipment and tools owned by Ace were foreclosed by Tompkins Bank that had lent money to that company. [3]

On January 9, 2012, Bella Masonry purchased from the bank a truck that had been repossessed from Ace Masonry and in March 2012, Bella purchased from the bank some of the tools and equipment that the bank had repossessed from Ace.

In the present, case, the evidence shows that Bella Masonry, after it commenced operations and Ace Masonry ceased operating, did some work that had originally been obtained by Ace. In this way, as to this work, Bella acted essentially as a subcontractor for Ace.

The evidence shows that although Ace Masonry ceased its own operations by the end of December 2011, the corporation was not dissolved. Instead, it subcontracted out its existing contracts, mostly to Bella Masonry which, as noted above, was owned and operated by Lisa's father-in-law who, during 2012, employed her husband Robert and all or most of Ace's former construction employees. From what I can gather, there seems to be two projects that Ace

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[2] Although Ace Masonry was originally owned by Lisa Bellavigna and Dave Tavner, the latter had sold his shares to Lisa Bellavigna by the time of the events that led to these cases. It should be noted that Dave Tavner and Lisa's husband, Robert Bellavigna, were the co-owners, via a company called BT of Ithaca, of the property from which Ace did business and to which Ace paid rent. She testified that at some point, Tompkins Bank foreclosed on that property.

[3] According to Lisa Bellavigna, she had a line of credit with Tompkins Bank which was in arrears and which resulted in that bank foreclosing on Ace Masonry's equipment and vehicles, among which were forklifts, trucks, tools etc.

Masonry had contracted for and which Bella Masonry continued to perform. These were construction projects for Episcopal Trinity Church and for Ithaca College.

As noted above, the first charge was filed in February 2012. That charge and all subsequent charges alleged that Ace Masonry and Bella Masonry were alter egos that had violated Section 8(a)(5) of the Act.

In addition to the unfair labor practice charges, the record shows that the Unions initiated State court actions to recover monies owed by Ace Masonry. Indeed, according to the testimony of Lisa Bellavigna, it seems that at some point, perhaps in the summer of 2012, one or more of the Unions obtained a restraining Order imposing certain restrictions on Ace from withdrawing or writing checks on its corporate account at Tompkins Bank.

At some point in 2012, Lisa Bellavigna, according to her own testimony, was told by a bank officer at Tompkins Bank that because the Carpenters Union was tying up Ace Masonry's account there, she would be well advised to close down the account and open up a new account somewhere else. According to her testimony, she agreed to this and expressed her intention of reopening her Tompkins account at some later date.

So, on August 6, 2012, Lisa Bellavigna opened, on behalf of Ace Masonry, an account at Citizens & Northern Bank with a deposit of $152,270.64. In this account, and over the next 14 days, she issued three checks in the amount of $90,000, $12,286.76 and $44,267. This account was then closed on August 20, 2012, with a withdrawal of $5,716.88. Based on her testimony, and in the absence of copies of the endorsed checks, it appears that a substantial amount of the deposited money was transferred to Bella Masonry. And as we have already seen, Bella Masonry was the alter ego of Ace Masonry. (In effect a payment from one entity to itself under a different name).

On October 11, 2012, Lisa Bellavigna on behalf of Ace Masonry, opened an account at Chemung Canal Trust Co. with an initial deposit of $2,093.67. This became an active and ongoing account for Ace and it was never actually closed. There were a number of transactions made at this bank that will be discussed later.

On October 22, 2012, Lisa Bellavigna opened, on behalf of Ace, an account at Community Bank. The initial deposit was in the amount of $18,290.95 derived from a check received by a customer of Ace. Discussed below will be a number of transactions at this bank.

Based on her testimony it is obvious to me that Lisa Bellavigna closed out Ace Masonry's corporate bank account at Tompkins Bank and opened up new Ace Masonry accounts at these various banks so as to evade making payments that Ace had contracted for with the unions that are the charging parties in this case.

The Respondents contend that Ace Masonry was justified, indeed obligated, to avoid making payments to the Unions and instead obligated to make payments to its subcontractors. In this respect, New York State Lien Law, Section 701 is cited. [4]

[4] A copy of this statute is appended to the Respondents' Brief and I will take official notice of it.

As I understand the State law, it is designed to insure that a vendor, subcontractor, architect, engineer, surveyor, laborer or materialman will get paid for work done or expenditures made arising out of the improvement of real property and incurred in the performance of his or her contract or subcontract. In effect, the law sets up a constructive trust wherein the general contractor is deemed to be the trustee with a fiduciary obligation to these categories of persons.

Given this state law, the Respondents argue that the unions would not be within the favored class of creditors and therefore Ace Masonry's payments to its contractors was justified. I disagree.

For one thing, the state law, at Section 71(2)(d), treats payments of any benefits or wage supplements owed by a contractor to its employees with the same level of priority as the persons described above. Therefore, the monies that Ace Masonry owed to the Union Benefit funds, which had accrued from before 2012, were monies owed to its own employees in the form of health and pension benefits receivable by its employees, via the union funds, as part of their compensation for having performed services for Ace.

For another thing, a large portion of the payments that Ace Masonry made during this period of time, were made to Bella Masonry, which was held to be the alter ego of Ace. Thus, any payments by Ace Masonry to Bella Masonry were essentially payments to itself and not a genuine arms length transaction between one independent contractor and another.

Finally, since the legal obligation of an employer subject to the jurisdiction of the National Labor Relations Act is to make contractually required payments to union trust funds where there is a lawful collective bargaining relationship, is one that is embodied in Section 8(a)(5) and 8(d) of the Act. Moreover, such payments are also protected by Section 302(c) of the Act. Therefore, to the extent that State law might conceivably conflict with the Federal law, then the latter must prevail under the Supremacy clause of the Constitution. (In fact, I do not see any conflict).

As noted above, Henry Bellavigna, who previously had been an employee of Ace Masonry, (and Lisa's father-in-law), opened up Bella Masonry in September 2011. And when Ace Masonry ceased being a functioning contractor, Bella took over Ace's employees and customers. That is, these same employees, (including Robert Bellavigna), continued to do the work that had originally been contracted for with Ace Masonry. Also, the record shows that much of the equipment used by Bella Masonry was purchased by it from Tompkins Bank which as noted above, had foreclosed on all or most of the equipment previously owned by Ace Masonry. (Tools, forklifts, etc.)

The evidence is that Bella Masonry did contracting work until August 2012 when Henry Bellavigna decided to terminate its operations. In this regard, it is quite clear from his testimony that he chose to close his business because the unions were pursuing litigation that asserted that Bella Masonry was the alter ego of Ace Masonry and that it therefore was liable for Ace's contractual obligations to the unions and to the represented employees.

In the meantime, on September 30, 2011, Bella Masonry opened a corporate account with Chemung Canal Trust Company with an initial deposit of $2000. Described below will be a number of transactions made from this bank account.

During the course of the year, Henry Bellavigna contracted with his son Domenick to purportedly provide certain advertising and web site services for Bella Masonry. These services which will be described below, are alleged to have been bogus or grossly cost inflated.

Also, after Henry Bellavigna decided to terminate Bella Masonry's operations, he conducted a private sale of the company's property. And as to this transaction, the General Counsel and the Charging Parties contend that a substantial portion of the proceeds from this sale found their way into Henry Bellavigna's pocket and not into Bella's corporate account.

As noted above, Robert Bellavigna was employed as a supervisory employee by both Ace Masonry and Bella Masonry. Since these were both small companies, I will assume that much of their field work was conducted under his supervision. The record establishes that Robert Bellavigna was entitled to write checks on Ace's account and was allowed to utilize Ace's credit card. He personally guaranteed an obligation in relation to the purchase of Ace's stock by his wife from David Traver. Additionally, the record establishes that as husband and wife, Lisa and Robert Bellavigna, jointly owned real property and also jointly owned personal financial accounts into which sizeable sums money were deposited soon after withdrawals were made from Ace Masonry's corporate accounts.

It is now time to do some accounting and look at bank records.

Accounts of Ace Masonry and accounts of Lisa and Robert Bellavigna

As noted above, Ace Masonry, in 2011, maintained an account at Tompkins Bank. Lisa Bellavigna, on the advice of a bank employee, terminated that account, essentially to avoid making owed payments to the various union benefit funds. Thereafter, on August 6, 2012, October 11, 2012 and October 22, 2012, she opened up, on behalf of Ace, accounts at Citizens & Northern Bank, Chemung Canal Trust Co., and Community Bank. As previously described, the Citizens & North Bank account was closed after 14 days. Subsequently, Lisa Bellavigna on behalf of Ace, opened another account at Chemung on or about June 11, 2014.

During this period of time and presumably to the present, Lisa Bellavigna and Robert Bellavigna, have maintained joint personal accounts at Tompkins Trust Company and Visions Federal Credit Union. Robert Bellavigna also had his own personal account at Community Bank. They also are the joint owners of their home and real property.

Bella Masonry maintained its corporate account at Chemung Canal Trust Company. Henry Bellavigna also maintained a separate personal account at this bank.

With respect to Ace's original account at Chemung, the record shows that over a period of time, Lisa Bellavigna made cash withdrawals in the following dollar amounts.

July 24, 2012	9800
August 4, 2012	700
January 7, 2013	1000
March 27, 2013	9970
March 28, 2013	9760
March 29, 2013	9760

Also with respect to Chemung, the record shows that after receiving a check for $46,500 from Ithaca College, Ace Masonry opened a new account at this bank on June 11, 2014. Immediately thereafter, Lisa Bellavigna made the following cash withdrawals from that account.

June 12, 2014	9300

June 13, 2014	9300
June 16, 2014	9300
June 17, 2014	9300
June 18, 2014	9300

With respect to the Ace Masonry's account at Citizens & Northern Bank, which was opened on August 6 and closed on August 20, 2012, the record shows that Lisa closed this account by making cash withdrawal of $5,716.88.

Turning to Ace Masonry's account at Community Bank, the record shows that Lisa Bellavigna issued checks made out to cash or withdrew cash in the amounts and dates as follows:

October 23, 2012	9000
October 25, 2012	8600
October 31, 2012	6000

With respect to all of these withdrawals, totaling $70,526.88, either of cash or checks made out to cash, Lisa Bellavigna could not or more likely would not remember what happened to the money, where it went, or what it was used for.

During the period between July 2012 and March 2013, cash deposits totaling $47,750 were made into the joint account of Lisa and Robert Bellavigna at Visions Federal Credit Union. These were as follows:

July 27, 2012	9600
August 31, 2012	2000
August 31, 2012	300
September 25, 2012	1300
October 3, 2012	2000
October 15, 2012	1050
October 22, 2012	800
October 31, 2012	4500
December 4, 2012	6000
December 12, 2012	500
December 13, 2012	700
December 21, 2012	2600
January 3, 2013	1000
January 5, 2013	800
January 29, 2013	2000
February 7, 2013	1000
February 16, 2013	2000
March 6, 2013	1700
March 27, 2013	7900

During the period from October 2012 and March 2013, cash deposits totaling $10,400 were made into the joint account of Lisa and Robert Bellavigna at Tompkins Trust Company.

During the period from August 6, 2012 to January 24, 2013, Robert Bellavigna made three cash deposits totaling $13,000 to his account at Community Bank.

Accounts of Bella Masonry and Henry Bellavigna

A review of the bank records for Bella Masonry show the following transactions, most of which were made at the time of, or soon after he announced the closing of the company. The records show the following dollar amount transactions:

12/23/11	10367 check signed by Henry Bellavigna, payable to himself.
3/27/12	17200 cash withdrawal made by Henry Bellavigna
8/3/12	2500 check signed by Henry Bellavigna, payable to himself.
8/9/12	4950.59 check signed by Henry Bellavigna, payable to himself.
8/10/12	4687.67 check signed by Henry Bellavigna, payable to himself.
8/13/12	4950.58 check signed by Henry Bellavigna, payable to cash.
8/14/12	8500 check signed by Henry Bellavigna, payable to cash.
8/15/12	8500 check signed by Henry Bellavigna, payable to cash.
8/17/12	8500 check signed by Henry Bellavigna, payable to cash.
10/2/12	601.75 check signed by Henry Bellavigna, payable to himself.
10/25/12	8000 check signed by Henry Bellavigna, payable to cash.
10/27/12	2577.08 check signed by Henry Bellavigna, payable to himself.
11/ 3/12	8000 check signed by Henry Bellavigna, payable to himself.
11/5/12	8000 check signed by Henry Bellavigna, payable to himself.
11/6/12	8000 check signed by Henry Bellavigna, payable to himself. [5]

As in the case of Lisa Bellavigna, Henry Bellavigna could or more likely would not remember what happened to the money taken out of the Bella Masonry account, where it went to or what it was used for.

As noted above, Henry Bellavigna announced the termination of Bella Masonry in August 2012. On August 17, 2012, he announced and thereafter held a private sale of Bella's equipment, most of which had originated from Ace Masonry. At this sale, Casler Masonry purchased items by checks payable to Henry Bellavigna. These were, respectively for $21,000 and $50,000. According to Henry Bellavigna's bank records, he deposited into his personal bank account, the $21,000 check plus $19,500 from the $50,000 check. The other $31,000 was deposited into Bella's account at Chemung Canal Trust. But the records from that bank show that a series of five cash withdrawals were made by Henry Bellavigna from September 10 to 14, 2012. Where this $40,000 went, he could offer no clue.

The sale also produced an additional $45,000. These proceeds were either paid in cash or by checks made out to and cashed by Henry Bellavigna. None of this money, as far as this record shows, went into Bella Masonry's bank account.

The cash withdrawals by Henry Bellavigna from Bella Masonry's bank account and his sale of the company's assets resulted in all of this money eventually finding its way into Henry Bellavigna's pocket. Therefore, these transactions essentially left Bella Masonry without money to pay off its creditors, including the union pension and benefit funds.

[5] Of lesser significance, but still relevant, the record establishes that from September 2011 to about February 2013, Henry Bellavigna made deposits by cash or check from himself to Bella Masonry's account. Although characterizing these as loans, these were never documented.

Transactions involving Domenick Bellavigna

There is also the matter of a transaction between Henry Bellavigna, purportedly on behalf of Bella Masonry, with his son, Domenick.

Domenick Bellavigna operates a company under the title of Bella Furniture and/or Bella Furniture Solutions. This company, once incorporated, and since run as a single proprietorship, is located in Florida. At one time, Henry Bellavigna was listed as an officer of the company but it does not appear that he has ever had any ownership or managerial interest in his son's Florida business. (He did once manage to utilize his interest in this company in order to take a deduction in his personal tax return). In any event, the evidence shows that Domenick Bellavigna did not have any ownership interest in either Ace Masonry or Bella Masonry.

There is an invoice dated May 1, 2012, for services performed by Bella Furniture for Bella Masonry. This allegedly was for the production of advertising brochures and the design and maintenance of a company website. A check for $34,000 was sent from Bella Masonry to Bella Furniture on August 28, 2012, shortly after Henry Bellavigna announced that Bella Masonry was going out of business. The question here is whether this payment was for real services or for bogus services. Was it simply a means to transfer money out of Bella Masonry's account for relocation to a member of the family and to evade paying creditors?

The General Counsel contends that about $18,700 charged for the design and maintenance of the website, was a grossly inflated amount. He asserts that a charge of $150 per hour for website design is, in his opinion, too much especially since Domenick essentially copied and modestly redesigned for Bella Masonry, the already existing web site that had been used by Ace Masonry.

I simply have no way of knowing if the amount charged by Domenick Bellavigna was appropriate. The General Counsel could have, but apparently chose not to call a witness who either was an expert in these sorts of things or someone with experience who could have testified what he or she typically charges for these types of services. Given this absence of testimony, I cannot conclude that this service rendered by Domenick Bellavigna was completely unreasonable.

The General Counsel also contends that the charge of $15,300 for the creation, printing and shipping of brochures was also unreasonable. These brochures, one of which was produced at the hearing were, according to Respondent's witnesses, made by an English company called Eman Printing. The record indicates that Domenick Bellavigna charged for the creation of 600 brochures, but that only 250 were ever produced and delivered. The record also shows that Domenick charged for printing out and inserting certain advertising materials into the brochures and that he charged for the stamps and for the mailing out the brochures. However, the credited testimony of Melissa Blanchard, who worked as the officer manager of Bella Masonry, was that she printed out the materials to be placed into the brochures; that she stuffed them into the mailing envelopes; and that Henry paid for the stamps and delivered them to the post office.

In light of the above, I am going to conclude that the charge for the brochures was inflated by including services that were not performed and by including the purchase of brochures that were not delivered. I therefore am going to cut the charge in half in order to approximate what I think would be a reasonable price for the creation of these brochures. ($7,650).

Finally, the evidence shows that Henry Bellavigna transferred four parcels of real property to Domenic Bellavigna. These were located in Hector, New York and were transferred on August 1 and 6, 2012 for the sum of $1.00. The assessed valuations of these properties totaled $30,600, and as pointed out by the General Counsel, were made when Henry Bellavigna was on notice of the NLRB's claim against Bella Masonry because of the allegation that it was an alter ego of Ace Masonry. (The NLRB Complaint was issued on June 27, 2012 and the hearing opened on July 30, 2012).

Analysis

The Board's treatment of whether or not individuals can be held personally liable for the backpay obligations incurred from the commission of unfair labor practices by a limited liability corporation has undergone some transition, discussion and debate over the years. In the present state of the law, the issue comes down to whether the Board can "pierce the corporate veil."

In *White Oak Coal Co.,* 318 NLRB 732, (1995), the Board reconsidered the standard that had previously been set forth in *Riley Aeronautics Corp*., 178 NLRB 494 (1969). The Board stated that it was reconsidering the standard for determining individual liability because if felt that the "multifaceted approach to imposing personal liability to be unclear and unwieldy." Instead, the Board adopted the 10Th Circuit's two pronged approach enunciated in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993). The Board's decision further stated that it was reaffirming "that personal liability for remedial obligations arising from corporate unfair labor practices under the National Labor Relations Act is a question of federal law because it arises in the context of a Federal labor dispute." Citing *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331, 335 (6th Cir. 1990) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). As to the new standard the Board stated:

> Under Federal Common law, the corporate veil may be pierced when: (1) there is such unity of interest and lack of respect given to the separate identify of the corporation by its shareholders that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.
>
> When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintained arm's length relationship among related entities; (8) diversion of the corporate funds or assets to non-corporate purposes; and in addition, (9) transfer or disposal of corporate assets without fair consideration.

> When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

In *Domsey Trading Corporation*, 357 NLRB No. 180, (2011), a Board majority held that the first prong of the *White Oak* test could be met simply by showing that there was a substantial comingling of funds between the corporate entities and the individual owners. In that case there was a one-time transfer of virtually all of the corporate assets to the owners who thereafter deposited the money into their own personal accounts. The Board concluded that this transfer would cause an injustice or inequity to the employees inasmuch as the transfer of funds left the corporations without asserts and essentially made it judgment proof unless the corporate owners could be held personally liable. The Board therefore also concluded that the second test of *White Oak* had also been met. This decision was subsequently affirmed by the Second Circuit Court of Appeals, sub nom, *Estate of Arthur Salm, v. NLRB*, (January 30, 2013). In discussing the application of the *White Oak* standard, the Court stated:

> While based on one major transaction, the Board rightly concluded that an analysis of these factors showed that Salm had indeed abused the corporate form to such a degree - by drawing down virtually all of the assets of the Domsey Trading Corporation for his personal use – that the first prong of the White Oak test has been met.
>
> The second prong of White Oak has also been met because it is clear that the abuse of the corporate form here would indeed promote injustice and allow for the evasion of legal obligations. By removing nearly all of the assets of the corporation, outside of the context of a legitimate winding down or dissolution, Salm made it likely that the corporation would be unable to meet its remedial obligations. Salm argues that because the three Domsey corporations, a single employer, were not shown to be insolvent, this prong has not been met. This is not the standard. Here, it is clear that his removal of these funds had the "natural, foreseeable, and inevitable consequence" of diminishing Domsey's ability to satisfy its remedial obligations.

In my opinion, the facts in the instant case show an equal or greater degree of commingling than was shown in the Domsey case. In the case of Ace Masonry, the evidence shows a continuous and substantial depletion of that company's corporate assets through diversion to both Lisa and Robert Bellavigna. In addition, the record shows that in August 2012, when Ace was on its way out of business, it transferred substantial funds to Bella Masonry, its alter ego.

By the same token the evidence shows substantial transfers of funds from Bella Masonry to its owner Henry Bellavigna. There is no question in my mind that his testimony regarding the whereabouts or use of these monies was disingenuous, and that the money

simply went from Bella Masonry into his pocket. [6] In the case of the sale of Bella Masonry's equipment, most of that money did not even make it into the company's corporate bank account.

I also conclude that these transactions made by the owners of Ace Masonry and Bella Masonry were undertaken with a motive to evade legal obligations to their employees. This was explicitly admitted by Lisa Bellavigna and implicitly conceded by Henry Bellavigna.

Thus, as to Lisa Bellavigna and Henry Bellavigna, I conclude that the two prong test of *White Oak* has been met and that these corporate shareholders should be held personally liable.

As to Robert Bellavigna and Domenick Bellavigna, the issue is somewhat different. Inasmuch as neither was a shareholder of Ace Masonry or Bella Masonry, there is an issue as to whether, "piercing the corporate veil," would applicable to these individuals. In this respect, there are a number of Board decisions involving closely held corporations and transfers of corporate money and assets to non-owner family members. See *A.J. Mechanical Inc*., 352 NLRB 874, 875-877 (2008); *D.L. Baker Inc*., 351 NLRB 515, 523–525 (2007); *SRC Painting, LLC*., 346 NLRB 707 (2006); and *Bufco Corp*., 323 NLRB 609, 624-629 (1997).

In my opinion, the present state of the law is best described in *SRC Painting, LLC*., supra. In that case, the ALJ concluded that the three corporate respondents were alter egos of each other and that all of the family members associated with these companies were personally liable. The Board agreed that four of the family members were personally liable because "each actively participated in the operation of the corporate respondents, including the distribution of corporate assets for non-corporate purposes." However, the Board also concluded that two members of the family, Karen and Constance Wierzbicki, who were not shareholders, should not be held personally liable. As to these two, the Board held that they could not be held liable simply because they were the passive recipients of diverted corporate funds. The Board, with Liebman concurring, stated:

> As the Tenth Circuit explained in *NLRB v. Greater Kansas City Roofing*, whose analysis the Board explicitly adopted in White Oak: "[A] necessary element of the [piercing-the-corporate-veil] theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege." 2 F.3d at 1053 (quoting from 1 Fletcher, C*yclopedia of Corporations*§ 41.20, at 639 (1990)). For this reason, a person's passive receipt of benefits that derive from a diversion of corporate assets for non-corporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the *White Oak* analysis. See *Smith Barney, Inc. v. Strangie*, 192 F.3d 192 (1st Cir. 1999) (finding wife who may have personally benefited from husband's diversion of corporate assets for non-corporate purposes not individually liable); *Firstmark Capital Corp. v. Hempel Financial Corp*., 859 F.2d 92, 95 (9th Cir. 1988) (finding wife who personally benefited from husband's

[6] Indeed there was some evidence, not fully litigated, that during the course of this trial, Henry Bellavigna was transferring some of his own money to yet another person.

> diversion of corporate assets for non-corporate purposes not individually liable). In other words, where the individual alleged to be liable plays no active role in the corporation's operations, that individual has not effectively become the business entity simply upon receipt of funds or other corporate assets, and accordingly cannot be held liable for the corporation's obligations. (Footnotes omitted).

In the present case, the evidence shows that Robert Bellavigna played an active role in the business affairs of both Ace Masonry and Bella Masonry. The evidence also demonstrates that he participated in the diversion of Ace's corporate funds to himself and to his wife. Accordingly, I conclude that he should be held to be individually liable.

I cannot come to the same conclusion with respect to Domenick Bellavigna. He is located 1,500 plus miles away and operates his own business. He had no ownership interest in either Ace Masonry or Bella Masonry and was not involved in their business operations except to the extent that he may have performed a contracted service for Bella Masonry. Based on the record in this case, I cannot say that a substantial part of the services that he provided to Bella were either a complete sham or were grossly overcharged. Nor can I conclude that his receipt of the four parcels of property, originally owned by his deceased mother, was part of a plan, *in which he knowingly participated*, that was designed to divert assets so that the corporations could evade their legal obligations to the employees and the union benefit funds.

I do note that in *SRC Painting, LLC*, Board Member Liebman opined that in similar circumstances, where a person receives corporate assets without consideration, he or she could be held personally liable by applying a fraudulent transfer theory instead of a piercing the corporate veil theory. Nevertheless, she did not do so because that theory was not argued by the General Counsel in that case. I see nothing in the statute that would preclude the Board from adopting a "fraudulent transfer" theory for finding personal liability. Indeed, the adoption of such a theory might deter individual from engaging in financial shenanigans designed to evade liability incurred from violatons of the National Labor Relations Act. However, this is not, as far as I am aware, the current state of Board law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER [8]

1. The Respondents, Ace Masonry, Inc., d/b/a Ace Unlimited, Bella Masonry, LLC, Lisa Bellavigna, Robert P. Bellavigna, Henry Bellavigna, their officers, agents and

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] As to the finding that the Respondents failed to furnish certain information, that information was sought to determine if Bella Masonry was the "disguised continuance and alter ego of Ace." Since it has been concluded in these proceedings they were alter egos, the information is now moot.

successors and assigns, shall make whole the employees named below by paying them the amounts following their names, with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Robert A. Bellavigna	308.84
Jason R. Dempsey	1,407.00
Joshua R. Freelove	1,824.08
David R. Howard	2,101.72
Brandon Marvin	288.00
Douglas F. Myles	635.39
Charles Morrow	4,297.76

2. The Respondents shall additionally remit to the union trust funds the contributions that the Respondents failed to make in the amounts set forth below, plus any additional amounts as prescribed in *Kraft Plumbing and Heating, Inc*., 252 NLRB 891, n. 2 (1980) aff'd. 661 F.2d 940 (9th Cir. 1981) and *Merryweather Optical Company*, 240 NLRB 1213, 1216 n.7 (1979).

Bricklayers Local No. 3 Funds	60,026.26
Bricklayers International Funds	11,949.79
Laborers Local 7	2,475.48
Laborers Local 1358	5,171.56
Laborers Local 589	596.80
Northeast District Council of Carpenters	48,553.16

3. The Respondents shall mail, at their own expense, to the former employees of Ace Masonry and/or Bella Masonry, a copy of the Board's Notice that was appended to the Board's Decision dated January 23, 2013.

Dated: Washington, D.C. November 25, 2014

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Raymond P. Green
Administrative Law Judge